IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 166 of 1980
with
Cross Objections

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

UNION OF INDIA

Versus

GULAM HUSAIN ALIBHAI,SINCE DEC'D THROUGH HIS HEIRS & L/R.

Appearance:

1. First Appeal No. 166 of 1980
MR RM VIN for appellant No. 1
NOTICE SERVED for Respondents No. 1/1
SERVED BY RPAD - (N) for Respondents No. 1/1

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 09/01/2002

ORAL JUDGEMENT

1. In this appeal filed under Section 96 of the Code of Civil Procedure ('the Code' for short), appellant Union of India, through General Manager, Western Railway, Church Gate, Mumbai has brought under challenge the judgment and decree dated August 31, 1979 passed in

Special Civil Suit No. 29 of 1975 by the learned Civil Judge (S.D.)., Bhavnagar by which the suit filed by deceased respondent for declaration and consequential relief came to be allowed by passing the decree as prayed for in the suit.

2. The suit in question was filed against appellant/defendant by deceased respondent/plaintiff for declaration that the order dated February 21, 1972 passed by Divisional Mechanical Engineer, Western Railway by removing the deceased respondent/plaintiff from service as a B Shunter was illegal and without any effect in law and to reinstate him on his original post with all due promotions, arrears of pay from October 22, 1971 till the date of filing of the suit which nearly amounted to Rs.19,250/- with costs.

3. The present appellant is the original defendant whereas the present respondent is the sole heir and legal representative of the deceased plaintiff and for the sake of convenience and brevity the parties hereinafter shall be referred to as "deceased plaintiff" and "defendant".

4. Before highlighting the controversy posed for my determination, it is necessary to give relevant facts of the case.

5. Deceased plaintiff had joined the service in the Railway department on May 1, 1950 as a Cleaner and thereafter he got three promotions and reached to the post of B Shunter and on the said post he was getting consolidated salary of Rs.515/- per month. The service record of the deceased plaintiff was quite clear upto October 22, 1971, that is, the date on which he was suspended. It was alleged against him by the Divisional Mechanical Engineer that he remained absent from duty for four hours. Deceased plaintiff was a Nigro which was a backward community and, therefore, he was disliked by the Divisional Mechanical Engineer, Bhavnagar and, therefore, he made baseless allegations to find fault with him. Deceased plaintiff was also given a memo dated October 22, 1971 by an unauthorized person designated as FDC. He was suspended telephonically. Thereafter he was removed from the service without holding any departmental inquiry by a person who was not the appointing authority. According to deceased plaintiff he was removed from service on baseless allegations in order to harass him by the Divisional Mechanical Engineer who wanted to give promotion to his favorite at the place of deceased plaintiff. It was also averred that if it was held that there was a default on the part of deceased plaintiff, it

was a petty fault of an employee and at the most one day's salary could have been deducted. The order of removal passed against deceased plaintiff was totally illegal, bad in law and therefore he was entitled to be reinstated on his original post with all due promotions and all consequential benefits including arrears of pay amounting to Rs.18,150/- from October 22, 1971 i.e., the date on which the notice was given to him. Deceased plaintiff, therefore, filed suit for the reliefs to which reference is made in earlier paragraphs of this judgment. The suit was filed as an indigent person as he had no sufficient means to pay court fees.

6. The suit was resisted by defendant by filing written statement at Ex.11 wherein inter alia the averments made in the plaint were totally denied. It was admitted that deceased plaintiff was put under suspension from October 22, 1971 for obstructive working. The order of suspension was signed by the competent authority. It was alleged against deceased plaintiff that on October 22, 1971 he boarded Engine of train No.498 and refused to get down. He was therefore arrested by the Railway Police and tried in the Court of Judicial Magistrate, First Class (Railway), Bhavnagar for the commission of the offence under section 121 of the Indian Railways Act. In the said trial, deceased plaintiff pleaded guilty and was convicted on his own admission and he was sentenced to pay fine of Rs.50/- and in default to undergo simple imprisonment for 20 days. It was therefore urged that deceased plaintiff was not entitled to claim protection of the provisions of Article 311 (2) of the Constitution for holding departmental inquiry in view of the fact that rule 14 (1) of the Railway Servants Discipline and Appeal Rules, 1968 ('the Rules' for short) is in conformity with proviso to Article 311 (2) of the Constitution. As per rule 14 (1), if penalty is imposed on a railway servant on the ground of conduct which has led to his conviction of a criminal charge, disciplinary authority may consider the circumstances of the case and make such order thereon as it deems fit. Lastly it was alleged that deceased plaintiff was not entitled to get any relief as prayed for in the suit including reinstatement, consequential benefits and arrears of pay of Rs.18,150/- and, therefore, it was prayed to dismiss the suit with costs.

7. It may be appreciated that deceased plaintiff was reinstated in service during the pendency of the suit by defendant. Thereafter his services were terminated on the ground that he was medically unfit in vision test and, therefore, deceased plaintiff amended the plaint. It was, inter alia, alleged in the amended plaint that

though deceased plaintiff was fit in the vision test, his signature was taken on a letter which was written in English Language and the contents whereof were not explained to him with a view to declare him unfit.

8. Defendant filed written statement against the amended plaint also vide Ex.63 wherein inter alia all the allegations made in the amended plaint were denied and reiterated that deceased plaintiff was unfit in vision test. It was also stated therein that the cause of action in the original suit and the one which was disclosed in the amended plaint both were completely different and, therefore, deceased plaintiff could not have joined both the causes of action in one suit. No notice was served under section 80 of the Code for the facts which were shown in the amended plaint and therefore also the suit was not maintainable and ultimately it was prayed that deceased plaintiff was not entitled to any relief and therefore the suit should be dismissed.

9. On the pleadings of the parties, the learned Civil Judge (S.D.)., Bhavnagar framed as many as 9 issues at Ex.13 and on appreciation of oral as well as documentary evidence and the relevant rules of the Rules, the provisions contained in Article 311 of the Constitution of India and reported judgments cited at the bar, came to the conclusion that the impugned order of removal from service passed against deceased plaintiff was illegal and without any effect in law as it was passed by defendant against deceased plaintiff without holding any departmental inquiry and without giving any opportunity of hearing and, therefore, deceased plaintiff was entitled to the reliefs as prayed for in the plaint and consequently passed the decree of declaration as well as reinstatement including backwages from February 21, 1972 till reinstatement and other consequential benefits by allowing the suit with costs. It is this finding and passing of the consequential decree of the trial court which is on the anvil before this Court in this appeal at the instance of defendant.

10. Deceased plaintiff has also filed Cross Objections aggrieved by the finding recorded by the learned trial Judge on issue Nos.7 and 8 which were framed by the learned trial Judge based on the averments made in the amended plaint.

11. It may also be appreciated that since deceased plaintiff died during the pendency of the appeal, his sole heir, his wife, was brought on the record of the

case by seeking necessary amendment.

12. Mr. R.M. Vin, learned counsel for defendant, has contended that in view of the provisions of rule 14 of the Rules, the procedure for holding departmental inquiry is not required to be followed and, therefore, order passed by defendant was quite legal and proper. What is stressed by the learned counsel is that deceased plaintiff was convicted for the offence under Section 121 of the Indian Railways Act as he boarded the Engine and refused to get down and he was imposed fine of Rs.50/Therefore it was not necessary for defendant Railway authority, that is, disciplinary authority to hold departmental inquiry against deceased plaintiff. It is also pointed out by the learned counsel that rule 14 of the Rules is in conformity with the provisions contained in Article 311 (2) of the Constitution wherein by virtue of the proviso it is made clear that it shall not be necessary for the disciplinary authority to give to the delinquent any opportunity of making representation on the penalty proposed if the penalty proposed to be imposed on him is based on the evidence recorded against him in a criminal case in which he is convicted. It is also emphatically contended that rule of principles of natural justice was not applicable in view of the specific provisions of rule 14 of the Rules and in view of the provisions of Article 311 (2) of the Constitution. The learned counsel, therefore, ultimately urged that the decree passed in favour of deceased plaintiff is erroneous and bad in law which is liable to be quashed and set aside by dismissing the suit filed by deceased plaintiff.

13. It appears from the record of the case that deceased plaintiff had filed cross-objections in this matter while appearing in party in person and thereafter Mr. M.D. Rana, learned advocate also appeared by way of legal aid. But thereafter vide order dated August 30, 2001, passed on the office note, this Court (Coram: R.P. Dholakia, J.) permitted the deletion of name of Mr. M.D. Rana as advocate for deceased plaintiff. Since deceased plaintiff died during the pendency of the appeal, his sole heir and legal representative, his wife, was brought on record and she was served by this Court. However, she did not appear in the matter when it is called out.

14. I have considered the submissions advanced by Mr. Vin, learned counsel for the defendant. I have also perused the impugned judgment and decree and the set of evidence as well as the relevant provisions of the Rules and the statutory provisions contained in Article 311 (2)

of the Constitution of India.

15. At the outset, be it stated that deceased plaintiff was examined at Ex.48 wherein he had stated about his initial appointment and then the promotions to the post of B. Shunter. It appears from his evidence that on October 22, 1971, he was given a memo with regard to his remaining absent from duty for four hours without obtaining permission. On October 22, 1971 he came on duty at 8 O' clock and worked upto 11 O' clock at the engine and at that time police came and arrested him. Thereafter he was released on bail by the Railway Police. The police filed criminal case against him for the offence punishable under Section 121 of the Indian Railways Act. He had pleaded guilty and, therefore, he was convicted and sentenced to pay fine of Rs.50/- On the basis of the said judgment, Divisional Mechanical Engineer, Western Railway issued order dated February 21, 1972 removing deceased plaintiff from service as Shunter. In the said order it was stated that the conduct of deceased plaintiff was such that it led to his conviction and hence his retention in the public service is undesirable and, therefore, in exercise of power conferred by rule 41 of the Rules the same order came to be passed. It is true that no departmental inquiry was held against deceased plaintiff. On having perusal of the Rules, in rule 6 it is stated that minor penalties as well as major penalties can be imposed upon a railway servant for good and sufficient reason. Deceased plaintiff was given a major penalty. As per rule 9 of the Rules, no order imposing any of the penalties specified in clauses 5 to 9 of sub-rule 1 of rule 6 shall be made except after an inquiry held as far as may be in the manner provided in rules 9 and 10. Therefore, as per the said statutory provisions of the Rules, show cause notice must be issued against the delinquent and he must be heard and then the disciplinary authority may decide about passing of the order of punishment. All these procedures are specified in rules 9 to 13. However, rule 14 of the Rules provides that notwithstanding anything contained in rule 9 to 13 1 (1) wherein penalty is imposed on the Railway Servant on the ground of conduct which has led to his conviction of a criminal charge, the disciplinary authority may consider the circumstances of the case and make such order thereon as it deems fit. Therefore, in my view, it was not necessary to hold departmental inquiry against deceased plaintiff for passing any disciplinary order including major punishment in view of the fact that deceased plaintiff was tried by the learned Judicial Magistrate, First Class (Railway), Bhavnagar for the offence punishable under Section 121 of

the Indian Railways Act and on his admitting guilt he was convicted and sentenced to pay fine of Rs.50/- by the learned Magistrate of Bhavnagar Railway Court. Therefore, in my view, by virtue of rule 14 of the Rules it was not incumbent upon the disciplinary authority to issue show cause notice and to hold regular departmental inquiry for the alleged act of indiscipline of deceased plaintiff when he was convicted by the competent criminal court.

16. The learned trial Judge has relied upon the judgment of this Court in the case of Babubhai Amidas Khristi v. State of Gujarat, 19 GLR 535. In the said case, this Court has considered the provisions contained in rule 64 of the Gujarat Panchayat Service Discipline and Appeals Rules and held that a Panchayat servant can be removed from service without holding an inquiry if he is convicted in a criminal case. However, in the said case it was also held that the disciplinary authority has to apply its mind and has to consider the circumstances of the case that why the inquiry is not necessary and he cannot straight way pass an order of removal. It was also held that the discretion should be used in quasi judicial manner. In my view, it is not proper to say that the provisions of rule 14 of the Rules and proviso to Section 311 (2) of the Constitution of India are similar in wordings and therefore the said decision is applicable to the facts of the present case. In view of the aforesaid facts and circumstances, I disagree with the reasoning given by the learned trial Judge with respect to that without holding departmental inquiry deceased plaintiff ought not to have been removed from service.

17. So far as the finding recorded by the learned trial Judge with respect to that there is nothing on record to show that how the incident has taken place in which deceased plaintiff had acted in an insubordinate way is in consonance with the evidence adduced before the learned trial Judge. It is true that the incident of boarding on the engine by deceased plaintiff had taken place. He was compelled to alight from the engine with the police help and the police thereafter arrested him and charge-sheet was filed and he was tried and on his pleading guilty he was convicted and sentenced to pay fine of Rs.50/- However, there is nothing on record to suggest as to why he boarded the engine when he was on duty on that day. Therefore, had a show cause notice been given to deceased plaintiff by the disciplinary authority all aspects would have been brought on record which would have been considered while imposing the

penalty against him.

18. So, looking to the charge in the criminal trial, the penalty of removal from service was imposed on deceased plaintiff and therefore question which arises for consideration is as to whether the penalty imposed on deceased plaintiff of removal from service shocks conscience of the Court and in the facts and circumstances of the case, can the said penalty be attracted.

19. There is no manner of doubt that the charge framed against deceased plaintiff was trivial and he was convicted and sentenced to pay fine of Rs.50/- Therefore, in my view, punishment of removal of deceased plaintiff from service was too harsh looking to the gravity of the charge. In this connection, reference is required to be made to the judgment of the Supreme Court in the case of U.P. State Road Transport Corporation v. Mahesh Kumar Mishra, AIR 2000 SC 1151. In the said case the Supreme Court has held that it is not that the High Court can in no circumstances interfere with the quantum of punishment imposed upon a delinquent employee after disciplinary proceedings. Not only Supreme Court but also the High Court can interfere with the punishment inflicted upon the delinquent employee if that penalty shocks the conscience of the Court. In the said case, a bus conductor was found to have issued tickets to all passengers but they were short distance tickets. The dispute about point at which passengers boarded the bus was decided not by examining passengers but by relying only upon report of Transport Inspector which was signed by delinquent. Therefore, interference with punishment on the ground that it is disproportionate is held proper.

20. Applying the aforesaid principles laid down by the Supreme Court to the facts of the present case, at the cost of repetition, be it stated that the charge against deceased plaintiff was very trivial which was met with the imposition of fine only. Therefore, the disciplinary authority while imposing major penalty or removal from service ought to have considered this aspect and, therefore, interference in the said order by the learned trial Judge is wholly justified.

21. Besides this, it may be noted that this matter was admitted way back in the year 1980. On Civil Application No.2788 of 1980 filed by defendant, stay against impugned decree was granted on condition that within a period of 15 days deceased plaintiff be reinstated and to deposit the entire decretal amount with

cost with the trial court with a liberty to deceased plaintiff to withdraw the amount against the security furnished to the satisfaction of the trial court. Pursuant to the said order, as reported by Mr. R.M. Vin, learned counsel for the defendant, deceased plaintiff had withdrawn the said amount and thereafter he died and his sole heir, his wife has been brought on record of this case. In that view of the matter, if this Court wants to take contrary view than the view taken by the learned trial Judge by remanding the matter to disciplinary authority for holding fresh inquiry in accordance with law that would be a futile exercise because inquiry against a dead person cannot be reopened. In this view of the matter also the judgment and decree passed by the trial court does not warrant any interference at the hands of this Court in exercise of power under section 96 of the Code.

22. In above view of the matter, I am of the opinion that the finding recorded by the trial Judge with respect to that deceased plaintiff ought not to have been removed without holding inquiry is not sustainable in view of the rule 14 of the Rules. However, on the facts and circumstances emerging from the case and more particularly relying upon the judgment of the Supreme Court in U.P. State Road Transport Corporation (supra) I am of the opinion that the punishment of removal imposed on deceased plaintiff shocks the conscience of the Court as it is too harsh. Therefore, interference at the hands of Civil Court is justified by granting relief of declaration as well as consequential relief including backwages.

23. Seen in the above context, I am in complete agreement with the decree passed by the trial court and ultimate conclusion reached by it and consequently this appeal and the cross-objections both deserve to be dismissed.

24. For the foregoing reasons, the appeal and cross-objections both fail and accordingly they are dismissed with no order as to costs.

(A.M. Kapadia, J.)